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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

## No. 355

NORMAN M. LITTELL, *Petitioner,*

v.

RAYMOND NAKAI

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY MEMORANDUM

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The memoranda filed by the United States as *amicus curiae* pursuant to the Court's invitation (A.C. Memo.) and by the respondent at the Court's direction (Br. Op.), which assert divergent and indeed inconsistent reasons for seeking to screen the ruling below from scrutiny here, actually argue convincingly that the present petition for certiorari should be granted.

For these documents make evident, far too evident, that the decision sought to be reviewed impinges on the Navajo Tribe's right to counsel of its own choosing, since it immunizes the respondent's interference with the functioning of the Tribe's lawyer, who was selected by the Tribe's governing body, and whose contract that body did not wish to terminate; that the same decision renders remediless in fact serious assaults upon the orderly processes of Indian self-government; and, finally, that the same decision carves out an exception in favor of Indian tortfeasors from a general statute conferring jurisdiction on the courts of the United States, in disregard of the settled principle that a general statute in terms applying to all persons includes Indians. Yet that decision rests on grounds that the *amicus* is pointedly unwilling to accept, and is moreover sought by the *amicus* to be defended on grounds never even suggested in either of the two lower courts.

We think that, for reasons about to be summarily stated, no decision so destructive in its effects and in its potentialities should be permitted to remain on the books in the absence of scrutiny by this Court.

*First.* 1. By reason of the provisions of R. S. § 2103 as amended (25 U.S.C. § 81; Pet. App. A10-A11), Indians whether individuals or organized tribes are deprived of one of the basic rights of citizenship, the right to counsel of their own choosing. As the late Mr. Felix S. Cohen pointed out in his *Handbook of Federal Indian Law* (1945) 77,

> "The Appropriation Act of March 3, 1871 provided * * * also * * * for the withdrawal from noncitizen Indians and from Indian tribes of power to make contracts involving the payment of money for services relative to Indian lands or claims against the United States, unless such contracts should be approved by the Commissioner of Indian Affairs and the Secretary of the Interior. *Since many of the grievances of the Indians were grievances against these officers, the Indians were effectually deprived by this statute of one*

> *of the most basic rights known to the common law, the right to free choice of counsel for the redress of injuries.* These prohibitions were amplified by the Act of May 21, 1872." [Citing R. S. §§ 2103-2106, 25 U.S.C. §§ 81-84; italics added.]

The same passage and its supporting citations were repeated verbatim in the Interior Department's revision of the Cohen treatise, *Federal Indian Law* (1958) 114.

The basic statutes remain on the books, notwithstanding the circumstance that in 1924, more than 40 years ago, all native born Indians were declared citizens of the United States by the Act of June 2, 1924, c. 233, 43 Stat. 253, reenacted by §§ 201 (a) and (b) of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1138, and now contained in 8 U.S.C. §§ 1401(a) (1) and (2).

2. As the record of the present controversy indicates, and that includes (R. 14-28) the related District of Columbia litigation against the head of the Indian Department (*Udall* v. *Littell*, 338 F. 2d 537 (D. C. Cir.), Pet. App. A16-A26,; *Littell* v. *Udall*, 242 F. Supp. 635 (D.D.C.), Pet. App. A27-A96), the present petitioner is General Counsel of the Navajo Tribe of Indians pursuant to a contract made with that tribe's governing body, the Navajo Tribal Council, which contract together with twelve amendments thereto had been duly approved pursuant to the statute.

That contract was sought to be terminated, not by the Navajo Tribal Council, which alone had power to do so pursuant to its terms (242 F. Supp. at 638, Pet. App. A32; Fdgs. 6-9, 242 F. Supp. at 652-653, Pet. App. A61-A62; Conc. 4-5, 242 F. Supp. at 668, Pet. App. A92-A93), but formally by the head of the Indian Department, action judicially held to have been without warrant of law (*Udall* v. *Littell, Littell* v. *Udall;* both *supra*), and then informally by the present respondent, in ejecting the Tribe's General Counsel from a meeting of the Council, action that was ap-

proved, and understood by the Indians to have been approved, by representatives of the Indian Department.[1]

That these interferences were not designed "to strengthen tribal self-government" (A. C. Memo. 3) is plain; the head of the Indian Department "directed his Solicitor to prepare new memoranda looking to termination of the plaintiff's contract by the Secretary without action by the Navajo Tribal Council. This direction was impelled by at least two factors: (1) plaintiff's refusal to resign, and (2) the realization that a majority of the Navajo Tribal Council were favorable to the plaintiff and would not vote to terminate his contract" (Fdg. 36, 242 F. Supp. at 657, Pet. App. A69-A70).[2]

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[1] See Fdgs. 92-93, 242 F. Supp. at 664, Pet. App. A85:

"92. On December 10, 1963, Chairman Nakai ordered the plaintiff to leave the Navajo Tribal Council meeting, and directed the sergeant-at-arms to remove him if necessary. Plaintiff then left the meeting. During the process of ejection, Zimmerman and the Bureau of Indian Affairs representatives sat by silently. The members of the Tribal Council regarded this silence as tantamount to approval, inasmuch as in the past Bureau representatives had always injected themselves into the discussions whenever they considered that an irregularity was taking place.

"93. On December 11, 1963, after plaintiff had been ejected from the Council Meeting, Zimmerman said to Councilman Wauneka, in substance, "Now you see that the Secretary of the Interior cannot be pushed around."

[2] This finding is supported, not only by Fdg. 24 (242 F. Supp. at 655; Pet. App. A66-A67), but, preeminently, by the testimony of the Solicitor on cross-examination (Tr. 1344):

"Q Your first recommendation was that he [the Secretary] recommend termination to the Tribal Council, wasn't it?

"A Yes, indeed. I asked Mr. Nakai [the respondent here] to get the Tribal Council to terminate it.

"Q. What did Mr. Nakai say?

"A He said he didn't have the votes."

In short, as the District of Columbia findings, carefully formulated after a plenary trial that lasted two full weeks, clearly show, it was not simply this petitioner whose rights were infringed by the parallel if not indeed concerted actions of the respondent Nakai in conjunction with the head of the Indian Department, it was the Navajo Tribe of Indians whose determination expressed through its governing body to keep the General Counsel they had themselves selected that has been hampered. It is the Tribe's right to counsel of their own choosing that is in fact infringed—even though in the present case, where the petitioner is asserting only his own interest in the relationship, they are not and need not be a party (*Arkansas* v. *Texas,* 346 U.S. 368, 369-370). It is the Tribe's processes of self-government that are being flouted. All too plainly, those processes are not being defended or protected in this proceeding, either by the respondent Chairman, or by the officer of the United States primarily charged with their protection—or by the position of *amicus curiae.*

Consequently, viewing the controversy in its entirety, the objective observer may therefore well ask, *Quis custodiet ipsos custodes?*

*Second.* The memorandum of *amicus curiae* pointedly fails to support the principal ground on which the court below rested its decision, all but abandons the arguments made by *amicus* in the court below, makes new contentions not heretofore presented either to the district court or to the court of appeals—and in general is far more notable for what it does not say than for what it does.

1. Perhaps most significant is the circumstance that the *amicus curiae* makes no effort whatever to support the ruling below on the principal ground thereof (Pet. App. A7), which was the notion that jurisdiction fails because of the emanations of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, viz., that since petitioner could not sue in a State court by reason of *Williams* v. *Lee,* 358 U.S. 217, *ergo,* he cannot

sue in a Federal court. Interestingly enough, respondent similarly makes no effort to support this distinctly weird application of the *Erie* doctrine.

2. It is also significant that although the *amicus curiae* admits (A.C. Memo. 5) that "To be sure, the general diversity of citizenship statute (28 U.S.C. 1332), on its face, covers this case," it never once makes mention of the principle that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 116. Nor does respondent show any awareness of that principle.

3. The reliance of both our opponents on *Williams* v. *Lee*, 358 U.S. 217 (A.C. Memo. 3, 4, 5, 6, 7; Br. Op. 4-5, 7, 8) is plainly misplaced. All that was decided there, as the record and the opinion in that case clearly show, was that the State courts had no jurisdiction of a white man's claim against an Indian in the absence of Congressional consent. Here the issue concerns Federal jurisdiction under a Congressional grant of power. No doubt it still needs to be reiterated (*Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133; *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626-627; *Cohens* v. *Virginia*, 6 Wheat. 264, 399) that the language of this Court's opinions must be read in the light of the facts of the case under discussion.

4. Moreover, while respondent argues (Br. Op. 2) that the present case "involves no more than a matter of jurisdiction of a federal court to consider a controversy between an Indian and non-Indian," the *amicus* in this Court substantially deviates from that proposition, which it urged in the court below. There it argued lack of jurisdiction (see Pet. 8 for the detailed contentions made). Now, however, it all but concedes jurisdiction, and suggests that such jurisdiction be declined for reasons of asserted policy

(A.C. Memo. 6-7), an argument never even intimated in either court below (R. 41-44; Pet. 8). Thus the present petitioner, seeking relief against a Tribal officer acting outside the scope of Tribal authority has been met, not with opposition on the part of the United States founded on a consistent principle, but with contentions whose only common thread is, all too obviously, sheer expediency.

5. Up to now, the functioning of Tribal courts has never been held to divest Federal courts of power to assume jurisdiction of Indian cases otherwise within their statutory competence, as two cases, neither of them cited either by the *amicus* or by the respondent, plainly show.

In *Talton* v. *Mayes,* 163 U.S. 376, this Court assumed that a Federal court had power to consider a writ of habeas corpus brought to test a judgment of conviction in a criminal proceeding in Tribal courts.[3] And, only this year, the court below reversed a judgment that dismissed for lack of jurisdiction a petition for habeas corpus brought by a woman who had been sentenced to confinement for contempt of the order of a Fort Belknap Tribal Court. *Colliflower* v. *Garland,* 342 F. 2d 369. That, plainly enough, was a proceeding beyond the competence of a State court under *Williams* v. *Lee* properly applied, yet the Ninth Circuit did not agree with the decision of the district court that remitted Mrs. Colliflower to whatever remedies might be available to her in the Tribal courts.

6. The insistence of *amicus curiae* that the Tribal court remedy is adequate (A.C. Memo. 3, 7-8), even though the judges of that court are appointed by the respondent chair-

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[3] *Held,* on the merits, that the appellant could not complain that the indictment pursuant to which he was tried and sentenced to be hanged in a special Supreme Court of the Cherokee Nation had been found by a grand jury composed only of five members, inasmuch as the Fifth Amendment does not apply to Indian courts.

man, not only fails to carry conviction—it is argued only in a footnote (A.C. Memo. 7, note 9), and the Tribal Code provisions governing the appointment of the judges (Pet. App. A14-A15) are not included among the Code provisions set forth at A.C. Memo. 9-12—but its argument, like that of the respondent on this issue (Br. Op. 4-5), overlooks two vital factors that underscore the inadequacy of the asserted Tribal Court remedy. One of these factors is factual, the other is legal.

*a.* Sections 381 and 386 of Title 7 of the Navajo Tribal Code provide as follows:

> **"§ 381. Court rules; authority to adopt**
>
> "(a) A majority of the judges of the Trial Court of the Navajo Tribe may adopt rules of pleading, practice, and procedure applicable to any or all proceedings in the Trial Court and the Court of Appeals of the Navajo Tribe. In addition, they may adopt uniform rules for the admission of evidence and may require the use of standard forms for pleadings, motions and other papers filed in court by litigants, as well as for judgments, writs, and court orders.
>
> "(b) Pending the adoption of such rules, and as to all matters not covered in such rules, the practices and procedures heretofore obtaining in the Navajo Courts of Indian Offenses shall be followed in the Trial Court and Court of Appeals of the Navajo Tribe.
>
> "(c) No rule adopted by the judges shall be effective until reviewed by one of the Tribal attorneys and approved by the Chief Justice."
>
> * * * * *
>
> **"§ 386. Attorneys; right of representation; appointment of prosecutor**
>
> "Professional attorneys shall not appear in any proceedings before the Court of the Navajo Tribe unless rules of court have been adopted as set forth in section 381 of this title prescribing conditions governing their admission and practice before the court.

> Every defendant shall have the right to have some member of the Tribe represent him and in the event he has no such representation, a representative may be appointed by the judge. The judge may appoint a member of the Tribe as prosecutor."

In fact, no rules of any kind have been adopted. Consequently if the present controversy were to be remitted to the Navajo Tribal Court, which in the view of the respondent and of the court below is the only tribunal competent to hear it, and which in the view of *amicus curiae* is the preferable forum for its resolution, petitioner would be deprived of any right to counsel, and would be obliged to proceed either *pro se* or through an attorney in fact not learned in the law.

Neither of the parties who have so vigorously opposed petitioner in the present litigation have yet undertaken to demonstrate how and why such a proceeding constitutes a remedy that is adequate in fact.

*b.* Nor would a proceeding in the Navajo Tribal Court be adequate in law.

The Chairman of the Navajo Tribal Council appoints the judges. 7 N.T.C. §§ 61, 121, 181; Pet. App. A13-A15. How then can those judges exercise any jurisdiction over him? The case of *Mississippi* v. *Johnson*, 4 Wall. 475, strongly suggests, if indeed it does not hold, that they cannot.

## CONCLUSION

The ruling below strikes mortal blows at Indian self-government and at the right of an Indian tribe to retain counsel of its own choosing, and, by effectually immunizing Indian tortfeasors from Federal accountability, casts a cloud over the powers of courts of the United States. No decision with such obviously disturbing and indeed demoralizing consequences should be permitted to stand

without review by this Court. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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